87-1514

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BERNARD J. CASEY
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QUESTION PRESENTED

Petitioner Armco purchased for $100,000,000 a failing coke plant close by its Ashland, Kentucky basic steel production works. Armco made the coke plant a department of the steel works and its sole source of coke, hired the coke plant employees, including the many who had lost their jobs, integrated coke production into the continuous steel producing process, and accreted the coke department employees into the larger single Ashland Works bargaining unit represented by the Steelworkers Union. The question presented is:

Whether the decisions of the National Labor Relations Board and the Court of Appeals, which conflict with fifty years of unbroken precedent, properly compel petitioner Armco, alone among all domestic basic steel manufacturers, to recognize two bargaining units for production employees in a functionally integrated steel manufacturing plant, thereby (1) giving employees in the coke department unfair leverage over the production in all other departments and (2) defeating the basic purpose of the coke plant purchase and, as a precedent, discouraging investments to resuscitate declining American basic industries.

PARTIES TO THE PROCEEDING AND LIST OF SUBSIDIARIES AND AFFILIATES

Petitioner Armco was a petitioner in the Court of Appeals and a respondent before the National Labor Relations Board. Also a petitioner in the Court of Appeals and respondent before the Board was the United Steelworkers of America, AFL-CIO. The National Labor Relations Board was a respondent in the Court of Appeals and Oil, Chemical and Atomic Workers International Union was an intervenor in that court.

Armco Inc. owns in part or is affiliated with the following companies: Acerex; Aceros Del Sur S.A. ; Armco Columbo S.P.A.; Armco Equipetrol S.A.; Armco Industrial S.A.; Armco Instapanel S.A.; Armco Moly-Cop S.p.A.; Armcopaxi S.A.; Armco Peruana S.A.; Australian Steel & Mining Corporation Pty. Ltd.; Black River Lime Company; Bundy Venezolana C.A.; Control International, Inc.; D.I.F.S.I.C.A; Charles Fulton Holdings Ltd.; Charles Fulton Pty. Ltd.; Charles Fulton Sendirian Berhad; Charles Fulton 1982 Ltd.; Inmobiliara Hierro y Accro, S.A.; Metaltubos C.A.; Northern Land Company; Obras Civiles e Industrias C.A.; Productos Metalicos Armco S.A.; Prolansa (Productora de Alambres y Derivados S.A.); Reserve Mining Company; Torcad Limited; Winning Post Investment Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Armco Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-16a) is reported at 832 F.2d 357. Copies of the opinion of the National Labor Relations Board (279 NLRB No. 143, May 30, 1986) and of the opinion of the administrative law judge, which are not yet officially reported, are lodged with the Clerk of this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Timely petitions for rehearing

were denied on February 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of Sections 8(a)(1), (2), (3), (5), (8)(d) and 9(c)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §§158(a)(1), (2), (3), (5), 158(d) and 159(c)(5) are set forth at App. 17a.

STATEMENT OF THE CASE

On December 31, 1981 Armco Inc. purchased from Allied Corporation for $100,000,000 a coke facility that the latter corporation had been operating at a loss in Ashland, Kentucky, and was about to close. Armco had been operating a nearby basic steel producing plant in Ashland—the Ashland Works—for many years, and proposed to integrate the coke facility into the Ashland Works. This would permit operating efficiencies and would ensure a steady supply of coke for the steel works. Because Armco's blast furnaces are highly vulnerable to an interruption of their supply of coke, without the reliability of supply and quality provided by an integrated coke department Armco needed to stockpile its inventory of coke, an inefficient, wasteful practice.[1]

[1] Depending on the level of supply, demand, and likelihood of work stoppage at any given time, Armco would stockpile between one and three months supply of coke. In 1983, at the time of the hearing, a month's supply of coke was valued at $7,000,000. Since the creation of the Ashland Works coke department, which afforded a predictable and uniform quality of coke to the blast furnaces, Armco has been able to reduce its coke usage by about 150 lbs. per ton of hot metal produced. This has resulted in a savings in blast furnace operating costs of $35,000 to $45,000 per day at assumed daily operating levels of 4800 (the operating level at the time of the hearing) to 6200 tons per day (the furnaces' capacity).

At the time of the purchase, Allied employees were represented by the Oil, Chemical and Atomic Workers International Union and its Local 3-523 (OCAW). There were then approximately 130 employees working at the failing coke facility, which was operating at 15% capacity. Approximately 250 additional hourly employees were on lay-off at the time, with no prospect of recall by Allied. Employees at the Ashland Works numbered approximately 3700 prior to the purchase and they were represented by the United Steelworkers of America and its Local 1865 (USWA).

Upon the takeover of the Allied facility by Armco, it became the coke department of the Ashland Works and was integrated into the continuous steel producing process. The coke department employees were accordingly accreted into the existing USWA Ashland Works bargaining unit. Full integration of the operations and of the bargaining unit was a central, overt object of the purchase. All involved parties—Armco, Allied, USWA, OCAW—were aware of this prior to the purchase. Armco and USWA representatives believed they had an understanding with the president of OCAW International that with the sale of the coke plant OCAW would cede its bargaining rights for coke plant workers to USWA. The OCAW president denied making a commitment for an unequivocal release of the coke workers,[2] but he acknowledged that OCAW decided not to challenge Armco's known intention to accrete the coke department workers into the USWA unit until the sale and integration were *de facto* events. OCAW decided not to alert Armco to its al-

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[2] The administrative law judge credited the OCAW president's testimony on this point.

leged objections at that time because it did not want Armco to consider its option of replacing the existing coke plant employees with new employees.[3]

On April 20, 1982, more than three months after Armco had hired all of the coke plant employees and integrated them into its steel manufacturing operation, OCAW International filed a charge against Armco asserting that Armco unlawfully recognized USWA and should have recognized OCAW as the bargaining representative of the coke department employees. In June, 1982, a parallel charge was filed against USWA. In May, 1983, the General Counsel of the National Labor Relations Board issued a complaint embodying these allegations.

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[3] This decision was discussed by the president of OCAW International in a letter to the members of the OCAW Local dated March 18, 1982:

> An employer purchasing a plant from another employer does not have to recognize the bargaining contract which existed between the Union and the seller. If the purchaser hires a majority of the employees who were members of the Union, such purchaser might have to negotiate with the Union that represented the employees prior to the sale. This is not true in every situation because *if the plant is purchased and becomes a part of the overall purchaser's operations, that purchaser may have to negotiate with the Union that represents his employees.*
>
> *The International Union has every reason to believe that had the [OCAW] International Union raised a question of representation rights prior to your being hired by Armco then Allied Chemical Corporation would have closed the plant down and laid everyone off thus freeing Armco to hire new employees rather than members of OCAW. (Emphasis added). (ALJ op. 39)*

The production of coke is now the first step in the continuous manufacturing process for the production of steel at the Ashland Works as it is in each of the many steel works which operate with an integrated coke plant.[4] The Ashland Works now is totally dependent on its own coke department for its coke supply. In contrast, prior to the purchase of the coke facility Armco's reliance on Allied for its coke needs varied from year to year and was far less than total.[5]

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[4] The manager of human resources at the Ashland Works testified to the "fiddle-string tight" nature of this continuous process:

> From the coke plant to the coiler on the hot strip mill, is what we would call a continuous process. We try—and the most efficient way to operate, is to try to operate without stopping any part of that process in the way, or cooling the product, or of wasting energy in any way at that point, by cooling it and inventorying it for instance, would be another inefficiency in the process, if we had to inventory between any one of these points.
>
> * * * * *
>
> So that whole operation from—literally from the coke plant to the coiler at the hot strip mill, is strung together fiddle-string tight, as far as a process is concerned.
>
> The closer we can keep that integrated, the more efficient we can—the more efficiently we can operate there. (T. 390-391)

[5] During the five years immediately preceding the purchase the Ashland Works acquired, on average, only 39% of its coke from the Allied plant. In 1981, the last year of the coke facility's operation by Allied, it supplied only 14% of the coke needs of the Works. Until 1982 Armco operated coke batteries in Hamilton, Ohio, which supplied some of the Works' coke, but after the purchase of the Allied facility Armco closed the Hamilton

The coke department operates under centralized plant-wide management and labor relations policies. Its superintendent has exactly the same degree of authority as do the superintendents of the 16 other operating departments of the Ashland Works. Like them, he reports to an area superintendent (coke department, blast furnace department, basic oxygen department, foundry department) and he has operating responsibility only. The coke department maintenance function is the responsibility of the Works maintenance forces, as is the case with respect to all of the operating departments. All employment, personnel and labor-related responsibilities are consolidated in the Works staff under the general supervision of the manager of human resources for the Works. Of course, the facility no longer has an independent economic purpose or role. Its economic contribution is subsumed in that of the Works as a whole.

In short, under Allied ownership the coke facility was a "plant" for Board unit determination purposes. It no longer is so. It is now one of several departments of a fully integrated steel producing plant at the highly strategic front end of the continuous steel manufacturing process.

Despite the fundamental transformation and total integration of operations that took place when the failing Allied plant was purchased by Armco and converted into the Ashland Works coke department, the administrative law judge ruled that the coke department was a bargaining unit separate from the bargaining unit for the rest of the production employees

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batteries, and since then has relied exclusively on its own coke department as the Works' coke source.

at the Ashland Works, and that Armco therefore violated §§ 8(a)(1), (2), and (5) and 8(d) of the Act by recognizing USWA and not recognizing OCAW as representative of the coke department employees and by applying the USWA-Armco contract to the coke department employees.[6] The Board affirmed the decision of the ALJ (279 NLRB No. 143). The Court of Appeals affirmed the Board, except for a backpay order.

REASONS FOR GRANTING THE WRIT

The decision of the court below conflicts with fifty years of legal precedent and constructive practical experience by which the production line employees of functionally integrated basic steel plants have been organized in single bargaining units. By permitting the employees in petitioner Armco's Ashland Steel Works' newly acquired coke department to organize as a separate bargaining unit, the decision awards to a small group of employees at the front end of the production process a stranglehold over all production, and thus over the livelihood of the vast majority of the employees and the economic success of the entire enterprise. The Court of Appeals conceded the existence of this destructive whipsaw potential—it recognized "the possibility of unfair leverage" (App. at 15a)—but it dismissed it as irrelevant when in fact it is at the center of the case. The court's decision rests on a backward looking analysis of what the situation had been when the coke facility was a separately owned entity which had failed, and brushes aside the

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[6] The ALJ also held that Armco violated § 8(a)(3) "by requiring coke plant employees to execute Steelworkers dues checkoff and authorization cards as a condition of employment"

constructively radical changes the acquisition by petitioner Armco brought in the coke employees' circumstances. These included restoration of the jobs and productive capacity of the coke facility and establishment of entirely new economic dependencies by integration of the coke facility with the entire steel works, all brought about by the Company's willingness to invest huge sums for the very purpose of creating those changes. The decision is thus profoundly hostile both to investment in domestic heavy industry and to the radical changes needed to revive it. It destroys the basis on which Armco sought to strengthen a major steel producing facility and thus help counter the heavy forces of contraction sapping the domestic steel industry in particular and national industrial production in general. Finally, the decision not only puts Armco at a distinct competitive disadvantage in the steel industry but also as a precedent it will encourage the socially undesirable consequence of fostering employee terminations as a condition precedent to many business takeover transactions. For these reasons the decision is not only erroneous, it is also highly significant and worthy of review by this Court.

1. Consonant with the transformation of the nearly extinct Allied plant into a vital department of the Ashland Works in totally new economic circumstances and with the full integration of the coke department into the steel production process of the Ashland Works, Armco accreted the coke department employees into the much larger existing single Ashland Works bargaining unit represented by USWA.[7] In

[7] The Board has often found accretion to be appropriate par-

doing so, Armco followed the lead of unbroken legal precedent and a long history of practical experience by which the production employees in basic steel and other manufacturing industries have invariably functioned as a single bargaining unit. The ruling of the Court of Appeals, upholding the NLRB, that the coke department is a separate appropriate unit from the rest of the Ashland Works squarely conflicts with well-established principles governing unit determinations in basic steel and other manufacturing industries.

In basic manufacturing industries characterized by a continuous production process such as the Ashland Steel Works, functional integration is and has always been the key determinant in unit appropriateness analyses. Bargaining units comprising one component of the production process have consistently been regarded as inappropriate.[8] There is no case in the more

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ticularly where, as here, a relatively small group of employees previously represented by another union has been acquired and become integrated by the new employer into its own larger operations. See, e.g., Martin Marietta Chemicals, 270 NLRB 821 (1984); Boston Gas Co., 235 NLRB 1354 (1978); Indiana Bell Tel. Co., 229 NLRB 187 (1977); Lansing General Hospital, 220 NLRB 1 (1975); Border Steel Rolling Mills, 204 NLRB 814 (1973); Joseph Cory Warehouse, Inc., 184 NLRB 627 (1970); Firestone Synthetic Fibers Co., 171 NLRB 1121 (1968); Federal Electric Corp., 167 NLRB 469 (1967); Humble Oil & Refining Co., 153 NLRB 1361 (1965); Granite City Steel Co., 137 NLRB 209 (1962).

[8] See, e.g. Continental Web Press, Inc. v. NLRB, 742 F.2d 1087, 1090-91 (7th Cir. 1984); Noranda Aluminum, Inc., 186 NLRB 217, 218 (1970); Alcan Aluminum Corp., 178 NLRB 362, 365 (1969); Geneva Steel Co., 57 NLRB 50, 55-56 (1944); Sheffield Steel Corp. of Texas, 43 NLRB 956, 959 (1942); Tennessee Coal, Iron & R.R. Co., 39 NLRB 617, 623-24 (1942); National

than fifty years of the Act's history which has approved a bifurcated unit of production line employees in the steel industry, or any manufacturing industry, where operations were functionally integrated. There are both economic and practical reasons for this. Collective bargaining is at its heart an economic exercise. It is the means by which an employer's employment costs are resolved in a unionized setting. Bargaining unit structures reflect this economic reality. In industries like basic steel in which a high degree of integration and mutual interdependence of operating units is the norm, the controlling economic reality is that all participants in the enterprise contribute to, and are bound by, a single, unitary plant-wide economy. Hence, bargaining units in such industries are also uniformly unitary and plant-wide.

From the practical perspective, a small group of employees at one stage of the continuous production process, such as the coke workers here, would, if they belonged to a separate bargaining unit, be able to exercise undue leverage over the total production process. A strike by the coke workers in pursuit of their own objectives could shut down the entire operation, leaving all Ashland production employees without work and gravely damaging the prosperity and prospects of the entire enterprise. The Court of Appeals for the Fourth Circuit was highly sensitive to this "stranglehold" problem in rejecting a separate unit for a group of calcite workers in an integrated stone quarry operation:

> Because of the integrated and interdependent nature of the Texas operations a labor dis-

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Tube Co., 33 NLRB 1248, 1251-52 (1941); Wheeling Steel Corp., 8 NLRB 102, 108 (1938).

> pute at calcite would undoubtedly severely disrupt the operations of the remaining facilities, causing economic hardship to employees not involved in the dispute but dependent upon the uninterrupted functioning of the quarry operation. This is neither the encouragement of stable collective bargaining nor is it collective freedom of choice as contemplated by the Act.

NLRB v. Harry T. Campbell Sons' Corp., 407 F.2d 969, 979 (4th Cir. 1969). The Court of Appeals for the Seventh Circuit took the same strong stand in *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1090-1091 (7th Cir. 1984):

> It is costly for an employer to have to negotiate separately with a number of different unions, and the costs are not borne by the employer alone. The different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike, thus imposing costs on other workers as well as on the employer's shareholders, creditors, suppliers, and customers.
>
> * * * * *
>
> Like Continental Web we find it difficult to understand why there should be separate units for pressmen and preparatory employees. . . . It is as if the Board had said that the workers at the beginning of an assembly line belong in a different bargaining unit from the ones at the end; for preparation and printing are successive stages in a single lithographic production process.

In the instant case, the Sixth Circuit acknowledged the "unfair leverage" problem but, in conflict with

the Fourth and Seventh Circuits, set it aside as if it were irrelevant to, or at best an unavoidable incident of, its holding. In fact it is at the core of the issue and is the fundamental reason that the Board's separate unit determination should have been overturned.

In essence, then, the Court of Appeals held, in conflict with all precedent, that two "appropriate" bargaining units may co-exist on one continuous production line.

2. Denigrating the critical factor of a single highly integrated and closely interdependent production process, the court's separate unit argument pivots on such subsidiary or irrelevant matters as the prior bargaining history when the employees were part of a separate and failing enterprise, a snapshot view of employee interchange, use of the same machinery as when Allied owned the coke facility, different skills of coke employees from those utilized at other stages of the production process, and a separate telephone exchange, credit union and time clock. App. at 10a-13a.

In subordinating the critical fact of functional integration to these marginal or irrelevant factors, the court relies on precedent relating to restaurant chains and grocery warehouses[9], which are in no sense comparable to a continuous production line in a manufacturing setting. Although restaurants and warehouses may experience some degree of functional integration through centralized management and per-

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[9] See Victoria Station, Inc. v. NLRB, 586 F.2d 672 (9th Cir. 1978) (cited at App. 11a; 2 of 7 restaurants); NLRB v. American Seaway Foods, Inc., 702 F.2d 630 (6th Cir. 1983) (cited at App. 11a; grocery warehouse).

sonnel policy, there is, unlike the production line, no substantial functional interdependence which would necessarily shut down one unit because of trouble in another unit. The court thus relies on factually inapplicable precedent while ignoring the extensive authority which applies directly to the manufacturing sector and which uniformly finds separate bargaining units inappropriate for a continuous production operation such as basic steel.[10]

3. The ruling below misconstrues and thus dismisses the economic factors which are central to the "community of interest" analysis underlying the bargaining unit question. Unit appropriateness questions

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[10] A separate unit is highly disfavored where "any work stoppage [in the proposed separate unit] is likely to have an immediate and adverse impact on the Employer's production operations." Motor Wheel Corp., 234 NLRB 358, 361 (1978); Noranda Aluminum, supra; Sheffield Steel Corp., supra, 43 NLRB at 959. The Board has consistently placed substantial reliance upon integration and interdependence of operations in denying requests for separate units in manufacturing industries. See, e.g., La-Z-Boy Chair Co., 235 NLRB 77, 78 (1978) ("[e]mployer's production process is functionally dependent upon the work of the tool-and-die employees"); E.I. DuPont de Nemours & Co., 205 NLRB 552, 554 (1973) ("high degree of functional integration between the sulphuric acid department and the operations of the entire plant"); U.S. Plywood-Champion Papers, Inc., 174 NLRB 292, 295 (1969) (where the proposed separate department was "an inseparable part of an integrated and functionally interdependent continuous flow production process"); Radio Corp. of America, 173 NLRB 440, 445 (1968) ("employees in the units sought. . . are highly integrated into the production output of the Company"); Mobil Oil Corp., 169 NLRB 259, 261 (1968) ("high degree of integration . . . between the powerhouse function and the storage and distribution operations").

are to be decided on the basis of whether there exists a "community of interest" in the proposed unit which is sufficiently separate and distinct from the broader unit to justify an independent entity for collective bargaining purposes. *Continental Web Press, Inc. v. NLRB, supra.* The acquisition of the coke plant in December 1981 brought about a full integration of operations which, in turn, wedded the interests of the coke department employees to the Ashland Steel Works and the domestic steel industry. The Court of Appeals failed to accord *any* significance to this vital change in circumstance which is the soul of the community of interest argument. Instead of recognizing the economic arguments as fundamental, the court dismissed them as matter pled in extenuation and mitigation, as a plea for "leniency." App. at 15a.

The court below saw *no* changes of any substance brought about by the sale of the coke plant. "The only real change has been an increase in production, a change which does not alter the nature of the employing industry." App. at 11a. The court thus completely disregarded the palpable and critical economic difference between a self-standing coke plant and a coke department of a steel works whose operation is an integral part of the steel making process. In the one instance the facility has its own economic mission, the production of quality coke at a cost which permits the facility to maintain its place in the market. This independent economic mission automatically gives rise to a community of interest in the persons associated in the enterprise. Their joint economic futures depend upon the preservation of a viable enterprise. For this reason, the coke facility was an appropriate unit when it was under Allied ownership. When Armco acquired

the coke facility that economic fact of life, which gave coherence to the coke unit in Allied's hands, disappeared, merging into the broader sphere of interest endemic to the steel works as a whole. Coke workers, like steelworkers, now make their contribution to the entire Works' economy. Their economic rewards and security rise or fall with the result achieved by the Works in the marketplace for steel products. In consequence, any bargaining between Armco and representatives of its coke department employees is governed by wholly different economic considerations than were the negotiations under Allied ownership. Now, the controlling economic factors which apply to all Works employees relate to the economic performance of the entire Works, not to that of any particular operating component of the Works. In brushing aside these crucial points, the Court of Appeals never examined the propriety of an independent unit for coke department employees specifically in the light of the circumstances now prevailing in the Company and industry in which those employees are now employed. It merely assumed that, because the employees involved were still engaged in the production of coke, there had been no changes of any consequence.

Instead of recognizing the dramatically new economic circumstances and personal goals, expectations, dependencies and allegiances created by the revival of the coke plant and its integration into the steel industry, the court looked backward to the defunct bargaining history between coke employees and their former employer, Allied. Past bargaining history may, of course, be considered in a unit determination context if it is currently reflective of a viable working relationship between the parties. But past bargaining

history is not relevant to a present unit determination involving a different employer, a different industry, and a different galaxy of economic interests and concerns.[11]

4. The rulings below undermine the basic purpose of Armco's acquiring and integrating the coke plant. Armco's $100,000,000 investment was intended to provide economic rationality to the operations of both the coke plant and the steel works. As a free-standing entity under Allied, the coke plant failed. Without a continuous flow of coke from a coke plant integrated with the steel production process, the steel works sustained the huge costs of the inefficiencies of stockpiling and of uneven coke quality. The acquisition of the coke plant and its subsequent integration into the steel works were undertaken for the purpose of eliminating the inefficiencies contributing to the decline of each. The rulings which we seek to overturn seriously interfere with this goal. By placing Armco—alone among all domestic steel manufacturers—in the vise of a splintered production line bargaining unit, the rulings require Armco to revert to its pre-acquisition, economically wasteful practice of coke stock-

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[11] In a recent successorship case, the Seventh Circuit admonished the Board for focusing too narrowly on the past bargaining history of employees with their former employer:

> A bargaining unit may have been in existence for some time before the change in ownership. However, the issue here is one of successorship, so that the Board must determine whether the unit was appropriate and remains so in the alleged successor. It begs the question to rely on the bargaining history of the predecessor alone . . . NLRB v. Indianapolis Mack Sales & Service, Inc., 802 F.2d 280, 285 (7th Cir. 1986).

piling in order to hedge against "the possibility of unfair leverage" enjoyed by the separately represented coke department at the front end of the production line.

5. As precedent, by conditioning the integration of newly acquired production units on the bifurcation of collective bargaining responsibilities, the rulings below will tend to discourage much needed investment to upgrade, integrate and make more efficient the country's heavy industrial production capacity. In this important respect, the rulings run counter to the reasoning of *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972), and *Howard Johnson Company v. Detroit Local Joint Executive Board*, 417 U.S. 249, 255, 261 (1974), which encourage investments of capital in domestic enterprises and expect and allow the purchaser of "a moribund business" (406 U.S. at 287) to make substantial operational and other changes. The rulings will also inevitably create an undesirable incentive on the part of similarly situated business purchasers to discharge the acquired company's incumbent employees. As the court below observed (App. at 3), although Armco "decided that the most efficient way" to operate the coke facility was "to integrate [it] into its Ashland Works," it could have chosen either to operate it "as a self-standing unit," or to "[purchase] assets only, allowing the company to hire new labor." The first alternative, of course, would have prevented Armco from obtaining the operational efficiencies of an integrated unit, a basic objective of the transaction. The second course of action—displacing incumbent employees—would, under the court's rationale, have been congruent with Armco's integrated unit objectives but

only at the senseless expense of the incumbent employees. We suggest that a rule of law which compels employers to engage in such socially disruptive conduct in order to achieve entirely lawful and economically desirable ends does not commend itself as a standard for future employer conduct or as an acceptable legal principle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 12, 1988

APPENDIX

APPENDIX A

Nos. 86-5616/5707/5825/5826

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ARMCO, INC. (86-5616/86-5825),

UNITED STEELWORKERS OF AMERICA, LOCAL 1865 (86-5707/86-5826),

Petitioners Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner.

ON PETITION for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Decided and Filed November 3, 1987

Before: MERRITT and MARTIN, Circuit Judges; and BROWN, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Armco, Inc., and the United Steelworkers of America seek review of an order of the National Labor Relations Board finding them guilty of an overly-aggressive organizational effort in violation of the National Labor Relations Act.

This case arises from Armco's acquisition of an Allied Chemical coke plant in Ashland, Kentucky on December 31, 1981. Armco owned and operated a steel production plant only a few miles from the coke plant, and it paid $100 million to Allied with the idea of obtaining a constant and high-quality supply of coke for its Ashland blast furnaces.

The controversy arose from Armco's unilateral decision to accrete the coke plant workers to the Steelworkers' bargaining unit at the steel plant, and from its failure to recognize or bargain with the Oil, Chemical and Atomic Workers (OCAW) which had always represented the workers at the coke plant. This decision resulted in a meeting at which the coke workers were required to sign Steelworkers' dues checkoff cards if they wished to work for Armco. The National Labor Relations Board found that the coke workers represented a separate and appropriate bargaining unit and that Armco's actions constituted unfair labor practices in violation of sections 8(a)(1), (2), (3), and (5), and 8(d) of the National Labor Relations Act, 29 U.S.C.A. §§ 158(a)(1), (2), (3), and (5), and § 158(d). The Board also found that, by its actions, the Steelworkers had violated sections 8(b)(1)(A) and (b)(2) of the Act, 29 U.S.C. §§ 158(b)(1)(A) and (b)(2). This decision appears at 279 N.L.R.B. 143 (May 30, 1986), and it affirms the lengthy rulings of the administrative law judge.

For the reasons that follow, we affirm, and we order that the decision of the Board be enforced.

I. *FACTS*

For approximately 35 years, Allied Chemical Corporation was engaged in the production of coke and its byproducts at the Ashland plant. Since 1952, that plant's employees were represented by the OCAW International Union, its Local 3-523, and OCAW's predecessor. The most recent collective bargaining agreement between Allied and OCAW was effective from August 5, 1979 through May 14, 1982. During

1981, the coke plant produced 500 tons per day, nearly all of which was sold to Armco. But, because the plant's production capacity was 2800 tons per day, nearly two-thirds of the employees had been laid off.

The employees of Armco's Ashland Works had been represented by the Steelworkers since 1942, and their most recent contract was effective from March 1, 1983 through July 31, 1986. During 1981, Armco needed about 2800 tons of coke per day to operate its Ashland Works. The coke Armco did not buy from Allied was purchased on the open market.

In 1979, Allied decided to withdraw from the coke-producing business, and it began selling its facilities. In 1981, Armco began looking toward the purchase of the Ashland coke plant. Armco apparently considered a number of alternative methods of operating the plant, and it decided that the most efficient way would be to integrate the facility into its Ashland Works. There were two other alternatives: operating it as a self-standing unit, which Armco alleges would have caused redundancy in maintenance personnel and would have continued the need to stockpile coke as a hedge against production interruptions; and purchasing assets only, allowing the company to hire new labor. The latter option was apparently rejected as incompatible with the strong union ethic predominant in Ashland. In addition, it would have been a great burden for Armco to train all new personnel.

In November 1981, Allied and Armco signed a letter of intent concerning the purchase. On November 25, two Allied representatives informed OCAW President Robert Goss of the purchase plan, telling him that Armco would not recognize the OCAW contract. Armco's Corporate Director, James Wallace, informed the Steelworkers District Director Edgar Ball that Armco wished to bring the coke plant workers in under the Steelworkers contract and that the company would not recognize the OCAW. On November 30, Ball called Goss

and related this development. Goss responded that, if satisfactory arrangements could be made with respect to job security, seniority, and pensions, the OCAW would consider releasing the employees.

Numerous conversations between the various parties ensued. The Steelworkers union was concerned that the OCAW might file raiding charges with the AFL-CIO. The OCAW's International Representative, Kenneth McKeand, said he intended to do everything in his power to keep the coke workers OCAW. It soon became clear, however, that the OCAW had little leverage against Armco. An Allied representative stated that, if Armco did not buy the plant, it would be shut down. Thus, despite an overwhelming vote among the coke workers to maintain their OCAW status and avoid accretion into the Steelworkers, the OCAW had no viable alternative because Armco was represented as "the only show in town."

A memorandum of understanding was signed between the Steelworkers and Armco on December 15, 1981, detailing the arrangements governing the purchase of the plant and the hiring of the coke workers. As a result, Armco offered to hire all of the Allied employees, recalling laid-off workers as production increased, with no probationary period required. The Allied workers, though, would all be given a new seniority date of December 31, 1981, and they all would be required to sign Steelworkers dues checkoff and authorization cards as a condition of employment. Although both Goss and McKeand initially objected to this requirement, they eventually told the coke workers to sign the cards rather than risk losing their jobs. At no time, however, did OCAW unconditionally release the employees to the Steelworkers, and at no time did the workers vote to be represented by the Steelworkers.

The sale was final on December 31, 1981, and, as of January 2, 1982, Armco began applying the terms of its bargaining

agreement with the Steelworkers to the coke plant employees. Armco had purchased all of Allied's equipment, material, and supplies, and it operated the plant with the same machinery, equipment, and production methods previously used by Allied.

What then followed were disagreements and struggles within the OCAW itself, apparently caused by dissatisfaction of the Local members. In March 1982, the officers of the Local OCAW sent a letter to the Steelworkers denying that the coke plant was an accretion to the existing Armco unit, and the letter stated that the OCAW had never been notified of negotiations between Armco and the Steelworkers involving the coke plant employees. These negotiations involved the coke workers' terms and conditions of employment and resulted in lost pensions, wages, seniority, vacations, and benefits. The Steelworkers did not respond to the letter.

In his letter of March 18, OCAW President Goss announced a meeting to be held March 28 to determine the position of the members on the issue of whether the OCAW should assert bargaining rights. The letter stated that the OCAW had not previously asserted those rights because its primary concern had been to ensure job opportunities and recall rights. Approximately 300 members attended the meeting, and they voted unanimously to assert the OCAW's bargaining rights at the coke plant.

On April 5, a committee of Local OCAW members sent Armco a letter demanding that it negotiate with the OCAW. The union denied that the coke plant was properly accreted to Armco's Steelworkers bargaining unit, and it asserted that Armco's interest in dealing with a single union was outweighed by the rights of the employees to choose their own bargaining representative. Armco responded by letter on April 12. The company refused to bargain with the OCAW committee on the ground that the coke workers were part of the Steelworkers bargaining unit.

Also on April 5, OCAW President Goss reported to the Local members that he was placing the Local union under the administratorship of an International representative. This change displeased Local members; through attorney Richard Bank, they filed an unfair labor practice charge against the OCAW International. The OCAW International then filed suit in federal court to enjoin the Local committee members from attempting to bargain on behalf of the OCAW. The district judge held a hearing on April 14 at which the various factions of the OCAW reached an agreement. The OCAW International agreed to file an unfair labor practice charge against Armco, and it agreed to attempt to regain bargaining rights. Bank agreed to withdraw the charges brought against the International. The court then entered an order denying the injunction against the Local, but the order did establish a limited administratorship for the purpose of holding an election of officers.

On April 15, the OCAW filed a charge against Armco, and the union made its first formal, authorized demand for recognition as the bargaining representative of the coke workers. The charge against the Steelworkers, which was consolidated with the charge against Armco, was filed by attorney Bank on June 14, 1982.

II. *PROCEEDINGS BELOW*

The administrative law judge upheld the OCAW's complaint against both the Steelworkers and Armco. He ordered that Armco cease granting recognition to the Steelworkers as the bargaining representative of the coke plant employees, cease giving effect to the collective-bargaining agreement between Armco and the Steelworkers for the coke workers, and cease giving effect to any dues checkoff authorizations in favor of the Steelworkers. He also ordered that Armco and the Steelworkers jointly and severally reimburse the coke workers for dues unlawfully withheld since January 1, 1982, with interest. The administrative law judge then recom-

mended that Armco reinstate the terms and conditions of employment for the coke workers that were in effect prior to Armco's unilateral changes. He also recommended that Armco reimburse the employees for any monetary loss suffered as a result. He specifically stated that Armco could not withdraw any benefits which had inured to the coke workers. He then ordered that Armco must bargain upon request with the OCAW as the exclusive representative of the workers in a bargaining unit defined as:

> All production and maintenance, all accounting clerical, office traffic clerical and stores clerical, plant chemist, research technicians, employees of the company at its Ashland, Kentucky [coke] plant, but excluding assistant plant controller, all employee relations department, plant buyer, storekeeper, draftsmen, and technicians of the plant engineering office, professional employees, guards and all supervisors as defined in the Labor-Management Relations Act, 1947.

As for the Steelworkers, the administrative law judge ordered that it cease giving effect to its collective bargaining agreement on behalf of the coke workers, cease accepting or deducting dues from the coke plant employees, and cease restraining or coercing the coke plant employees in the exercise of their rights guaranteed under Section 4 of the Act. He also held the Steelworkers liable for the reimbursement of the coke plant employees, with interest, for any dues deducted since January 1, 1982.

The recommendation and the remedial order were adopted by the National Labor Relations Board. (One of the three members of the panel dissented in part.)

III.

Both the Steelworkers and Armco argue on appeal that the Board abused its discretion in finding that the coke workers

constituted a separate and appropriate bargaining unit and that, therefore, neither party violated the Act by its actions. The Steelworkers union also contends that the charge filed against it was untimely because it was filed beyond the six-month limitations period of section 10(b), 29 U.S.C. § 160(b). As mentioned above, we find that the OCAW's action was timely filed, and we hold that the Board did not abuse its discretion in finding the coke plant employees were a separate and appropriate unit.

A. *The Statute of Limitations*

The Steelworkers union attempts to rely on *United States Postal Service Marina Mail Processing Center*, 271 N.L.R.B. 397 (1984), to show that the OCAW had unequivocal notice of Armco's decision to recognize the Steelworkers as the coke workers' representative earlier than December 15, 1981, the date of the memorandum of understanding. We are not persuaded. While we agree with the Board's statement in that case, that the 10(b) period begins to run at the time an employee receives unequivocal notice of an adverse employment action rather than the time that action becomes effective, 271 N.L.R.B. at 400, we find that such an interpretation does not serve to bar the OCAW's action against the Steelworkers in this case.

Here, the Steelworkers union contends that the statutory period began to run on December 5, 1981, when Armco's manager informed OCAW representatives that Armco would treat the coke workers as an accretion to the Steelworkers unit and recognize the Steelworkers as their bargaining representative. As the Board points out in its brief, there is no evidence that the Steelworkers' representatives present at the December 5 meeting assented to Armco's plan. At a meeting a few days earlier, the Steelworkers had expressed concern over being chareed with violating the no-raiding provisions of the AFL-CIO constitution. The OCAW may reasonably have assumed that the Steelworkers would honor these provi-

sions. Thus, though the announcement at this meeting certainly provided the OCAW with notice of Armco's intent, we cannot construe it to have constituted unequivocal notice of what the Steelworkers planned to do. We find that such unequivocal notice only occurred on December 15, 1981, when the Steelworkers signed the memorandum of understanding with Armco. Thus, the June 14, 1982 charge against the Steelworkers was filed within the six-month time period of section 10(b).

B. *Accretion versus a separate and appropriate unit.*

Both the Steelworkers and Armco contend that the Board improperly determined that the coke plant employees constituted a separate and appropriate bargaining unit and that, therefore, the employees were properly represented by the Steelworkers. We disagree, and we hold that the Board's designation of the coke plant workers as an appropriate unit was correct.

To determine whether two groups of employees should be included in the same bargaining unit, the Board applies a "community of interests" test: the two groups must share a "community of interests sufficient to justify their mutual inclusion in a single bargaining unit." *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1038 (9th Cir. 1978). This test consists of several factors: (1) similarity in skills, interests, duties, and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organizational and supervisory structure; (4) the bargaining history; and, (5) the extent of union organization among the employees. *NLRB v. American Seaway Foods*, 702 F.2d 630, 633 (6th Cir. 1983). "Employee desires," an additional factor frequently included in other circuits, is not a relevant factor in this circuit. *NLRB v. Pinkerton's, Inc.*, 428 F.2d 479, 484 (6th Cir. 1970).

Because of its wide experience, the Board should be given some deference in its selection of an appropriate bargaining

unit through the application of the "community of interests" test. *South Prairie Construction Co. v. Local 627, Operating Engineers*, 425 U.S. 800 (1976). The Board's ultimate determination as to the appropriate unit must be upheld unless it is arbitrary, unreasonable, or an abuse of discretion. *NLRB v. American Seaway Foods, Inc.*, 702 F.2d at 632. But we review the Board' s factual conclusions regarding the individual factors with less deference. The National Labor Relations Act provides the standard of review of such factual determinations: 'The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive." 29 U.S.C. § 160(a).

We believe the Board's finding that the coke workers constituted a separate, appropriate bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion. Further, we believe that the Board's intermediate, factual conclusions, which form the basis for its ultimate determination, are supported by substantial evidence.

The administrative law judge's conclusion that the two employee groups had dissimilar skills, duties, and working conditions is clearly supported by substantial evidence. All parties have acknowledged that the coke workers possess different skills, and that they work in a more hazardous environment than most steelworkers. Moreover, though the coke workers are not necessarily more skilled or better trained, their training is significantly different. This discrepancy surely was one of the reasons Armco chose to hire the Allied employees rather than an entirely new work force. In addition, the carcinogenic conditions existing in the coke plant are a constant hazard to the coke workers, and, therefore, constitute a legitimate ground for separate bargaining.

Armco argues that the second factor, functional integration, was wrongly decided by the administrative law judge to militate against a finding of accretion. Armco emphasizes the continuous nature of the process for coke plant to finished product. We are not persuaded.

Formerly, the coke workers unit was an independent, separate plant with a long bargaining history and a long union relationship. This fact alone suggests the appropriateness of a separate bargaining unit. *Bay Medical Center, Inc. v. NLRB*, 588 F.2d 1174, 1177 (6th Cir. 1978) ("Courts have long recognized that the Board may take bargaining history into account when determining whether a proposed bargaining unit is appropriate."). No machinery has been transferred between the plants, and the coke plant continues to maintain its own telephone exchange, credit union, and time clock. Moreover, the coke workers continue to perform the same work, by the same methods, and using the same machinery as before Armco's purchase. Most employees also have the same supervisors. The only real change has been an increase in production, a change which does not alter the nature of the employing industry.

In addition, the lack of employee interchange between plants militates against a finding of functional integration. *NLRB v. American Seaway Foods, Inc.*, 702 F.2d at 635. Out of a workforce of 2700 steelworkers, only 24 maintenance employees have any contact with the coke workers. Such a small, one-way exchange fails to undermine the appropriateness of the coke plant as a separate bargaining unit. *See Victoria Station, Inc. v. NLRB*, 586 F.2d 672, 675 (9th Cir. 1978). Furthermore, the hazardous conditions in the coke plant substantially decrease the possibility that steel plant employees would seek to transfer to coke plant jobs.

This fundamental problem, a lack of employee interchange, is exacerbated by the fact that all of the coke workers have a seniority date of December 31, 1981. In relation to the majority of the steelworkers, the coke workers have no seniority. Therefore, it is unlikely that any of the coke workers will be able to transfer in the near future. Thus, Armco's claim that it has done the coke workers a great favor by giving them the possibility of transferring to a more desirable division is not borne out in reality.

The company also argues that the administrative law judge incorrectly assessed the two union's bargaining histories. Although both the steel and coke industries have a history of independent union organization, Armco emphasizes that, in the steel industry, there are no steel plants in which the coke plant workers are represented by a separate union.

This argument is unavailing. Armco has failed to cite any case in which a previously-independent coke plant has been acquired and the employees accreted to a pre-existing steelworkers bargaining unit. Furthermore, the case upon which it primarily relied, *Granite City Steel Co.*, 137 N.L.R.B. 209 (1962), can be readily distinguished. First, *Granite City* involved only 16 original powerhouse employees in contrast to the 400 employees in this case. Second, the wind and steam produced by the powerhouse workers are not commodities, like coke, which can be purchased in the open market. Moreover, these elements, which are used to operate blast furnaces, are arguably more integral to the steelmaking process. Finally, the powerhouse employees in *Granite City* had previously belonged to a bargaining unit which represented all of the powerhouse employees of the Union Electric Company; they had no history as a separate bargaining unit. These factors made a single bargaining unit appropriate in *Granite City*. Here, however, including the coke workers and the steelworkers in the same bargaining unit would compromise the coke workers' section 7 rights "to self organization . . . [and] to bargain collectively through representatives of their own choosing. . . ." 29 U.S.C. § 157.

Admittedly, the third factor, the employer's organizational structure, may militate in favor of accretion. We concede that Armco exhibited centralized hiring procedures, and it demonstrated that wages, hours, and terms of employment were generally uniform.

But such proof does not undermine the reasonableness of the Board's determinations. As of the date of the hearing,

no new employees had been hired. More importantly, the uniformity in wages, hours, and terms of employment is the result of the disputed conduct: the application of the Steelworkers' contract to the coke plant employees.

In sum, we hold that the Board's finding that the coke workers constituted a separate and appropriate bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion. Furthermore, we hold that the factual conclusions which formed the basis of this determination are supported by substantial evidence. Therefore, by treating the employees at the coke plant as an accretion to the steel plant unit, Armco and the Steelworkers violated the Act.

C. *Requiring employees to execute Steelworkers dues checkoff and authorization cards as a condition of employment.*

It is well settled that the dues checkoff provisions are intended to be an area of voluntary choice for the employee. *NLRB v. Atlanta Printing Specialties*, 523 F.2d 783, 787 (5th Cir. 1975). Threats by either a union or an employer that employees will be discharged for failure to sign checkoff authorization cards violates the Act. *Metal Workers' Alliance, Inc.*, 172 N.L.R.B. 815, 817 (1968). Thus, as long as the Board's factual finding that Armco and the Steelworkers compelled the coke plant employees to sign the cards as a condition of employment is supported by substantial evidence on the record as a whole, we must affirm the Board's conclusion of violation. 29 U.S.C. § 160(a).

The evidence demonstrates that the Board's finding is supported by the record as a whole and is entitled to affirmance. Three former Allied employees testified on the record that, during a January 1982 orientation session, they were told that they had to sign checkoff and authorization cards if they wanted to work at Armco. A fourth coke plant employee, recalled from layoff in March 1982, testified that a similar

statement was made in an orientation session following his recall. He specifically testified that he signed the checkoff authorization only because he believed he had to do so to get a job. Armco manager J. Edward Maddox admitted that he had taken the position that coke plant employees had to sign the card to work for Armco. The administrative law judge expressly discredited Armco supervisor Herb Salyer's testimony that he had not made statements which employees specifically remembered him making.

We believe that this testimony constitutes substantial evidence to support the Board's finding that Armco and the Steelworkers compelled the employees to sign the union's dues checkoff and authorization cards as a condition of employment. Thus, we affirm the Board's finding that Armco violated sections 8(a)(1), (2) and (3) of the Act and that the Steelworkers violated sections 8(b)(2) and (b)(1)(A).

D. *Armco's failure to recognize the OCAW*

As we have already stated, we believe the Board correctly concluded that Armco was a successor employer and that the coke plant remained an appropriate unit even after the Armco purchase. Under these circumstances, we have no difficulty in finding that Armco violated sections 8(a)(5) and (1) of the Act by failing to recognize and bargain with the OCAW as the representative of the coke workers before making unilateral changes in their working conditions.

The facts fail to support Armco's contention that the OCAW waived its bargaining rights. In any case, such a waiver of a statutory right must be in "clear and unmistakable language." *Timken Roller Bearing Co. v. NLRB,* 325 F.2d 746, 751 (6th Cir. 1963). An unambiguous waiver was not evident in this case.

Therefore, as was the case in *NLRB v. Burns Security Services,* 406 U.S. 272, 279-80 (1972), the bargaining unit

remained unchanged, and Armco was not entitled to upset the union majority by recognizing another union.

We believe there was substantial evidence to support the Board's conclusion that Armco violated sections 8(a)(5) and (1).

IV. *Conclusion*

In essence, Armco and the Steelworkers have asked for leniency based on the current adverse economic climate of the steel industry. Their plea also emphasizes the charitable nature of Armco's act of buying a suffering plant and hiring its entire workforce. We have no doubt that Armco stepped in at a crucial moment in the lives of the coke workers and Allied, and we sympathize with the plight of those in the steel industry. We also recognize that the relatively small size of the coke workers bargaining unit creates a possibility of unfair leverage. None of these factors, however, justifies the flagrant refusal of Armco and the Steelworkers to recognize and bargain collectively with the OCAW.

It has come to our attention that the remedy ordered against Armco may be too harsh, for it would require the company to pay wages perhaps as much as three dollars per hour more than the coke workers have been receiving since the time of the plant's purchase. In *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), the court set aside part of a similar remedial order and remanded the matter to the Board. The court there found that "[t]he function of the remedy . . . is to restore the situation, as nearly as possible, to that which would have occurred but for the violation." *Id.* at 1103, *citing Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). In *Kallman*, the facts indicated that the employer would not have agreed to union demands to pay the higher rate.

We believe that the same may be true in this case. Thus, we hold that the employer is responsible for the pay difference for the time which would have been required for bar-

gaining. We will remand this matter to the National Labor Relations Board, however, for the factual determination required to decide the extent of backpay. As the court did in *Kallman*, we will leave it to the Board's discretion whether the resolution of these issues should be left to bargaining between the parties.

Therefore, with the exception of the backpay award, we affirm the findings of the National Labor Relations Board, and we grant enforcement of its order.

NATIONAL LABOR RELATIONS ACT

Sections 8 and 9 of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158, 159, provide in pertinent part:

§ 8 Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, . . .

§ 9 Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, . . .

(c) (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.